Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1978

No. 78-936

ATLAS TACK CORPORATION,
Petitioner,

v.

RAYMOND MAHONEY, ET AL.,
Respondents.

ATLAS TACK CORPORATION,
Petitioner,

v.

RAYMOND HOEFEL,
Respondent.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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INDEX

	PAGE
Appendix A—Opinion of United States District Court	1a
Appendix B—Opinion of Court of Appeals dated August 9, 1978	12a
Appendix C—Order of Court of Appeals dated September 12, 1978	25a
Appendix D—Judgment of United States District Court	26a
Appendix E—Opinion of United States District Court in *International Union, etc.* v. *Atlas Tack, et al.*	28a
Appendix F—Constitutional provisions, statutes and rules involved	34a

APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 73-1038 SECTION "F"

RAYMOND MAHONEY, ET AL.,

vs.

ATLAS TACK CORPORATION, ET AL.

ALAN S. NOVICK, ESQ.
Attorney for Plaintiff,

EDWARD WOLL, JR., ESQ.
Attorney for Defendants.

RUBIN, Circuit Judge: *

After former employees of Atlas Tack Corporation ("Atlas") had retired and had begun receiving pensions, the Atlas pension plan was terminated, and payment of their pensions stopped. These pensioners seek a declaration that Atlas must provide each of them with an amount sufficient to purchase an annuity insurance contract sufficient to pay him pension benefits for life.[1]

* Sitting as District Judge by designation of Chief Judge John R. Brown.

[1] The action was begun in state court and was removed to federal court on the basis that it arose under Section 301, Labor Management Relations Act of 1947, 29 U.S.C. § 185. A motion to remand was previously denied by another judge of this court. When the matter reached trial, it became apparent that the plaintiffs were not union members and that, as the court noted *sua sponte*, this jurisdictional basis was doubtful. However, the court retained jurisdiction on the basis of the allegations of the complaint.

There are twelve plaintiffs named. One plaintiff, William Poenack, has withdrawn, and another plaintiff, Harold Vokes, is deceased and will be dismissed by stipulation.

Atlas negotiated a pension plan for members of its collective bargaining unit with the International Union, United Automobile, Aeropower and Agricultural Implement Workers of America, UAW and its Local 899 (the "Union"), on September 9, 1964, to begin as of July 1, 1963. The company voluntarily included non-union employees in the union-negotiated pension plan; this included foremen who were not eligible to be members of the bargaining unit, and plant clerical workers, who were later the object of a separate union campaign.

A summary of benefits provided under the plan was distributed to each of the plaintiffs, as well as to all other workers. The summary recites, *inter alia:*

> The Company fully expects to continue the Plan subject to the terms of its present Pension Agreement with its employees. However, *since future changes in conditions cannot be foreseen, the Company necessarily reserves the right to change, suspend or discontinue the plan at any time.* No change, suspension, or discontinuance will adversely affect the pensions already purchased, unless a change is made in the Plan for the purpose of meeting the requirements of the Federal Internal Revenue Code or any other applicable law. (Emphasis supplied). Pension Plan, ¶ 14.

The plan was administered by Aetna Life Insurance Company ("Aetna"). Under its terms, when an employee reached retirement age, Atlas contributed a sum sufficient, which was added to the amount already held in for his account, to buy a lifetime annuity contract for him from Aetna. Thus, neither any later amendment to, nor discontinuance of, the plan could adversely affect the rights of an employee after retirement.

On April 15, 1968, the pension plan was changed from an insurance-funded plan ("insurance plan") to a trust-funded

plan ("trusteed plan"). Under the trusteed plan, Atlas contributed annually an amount sufficient, when added to credits in the plan, to pay the benefits due each retired employee. The change thus made retirement benefits depend upon continuance of the plan and on Atlas' continued solvency.

None of the plaintiffs received any pension payments until after April 15, 1968, and, therefore, no pension contract was purchased for any of the plaintiffs. After that date, the contract between Atlas and Aetna was amended to terminate the insurance plan. Pensions were paid as a result of annual contributions by Atlas in addition to the relatively modest accumulated credits.

The change from an insured plan to a trusteed plan was necessitated by a change in Atlas' gross sales, the resultant reduction of its profitable operations to losses, and by the high cost of the insured plan compared to the trusteed plan. Atlas was suffering severe economic losses and felt that it was essential to reduce the annual amounts it was required to pay for pension benefits. The facts were put before the union, and it agreed to the change as to the union employees. They were not disclosed to the non-union employees who are plaintiffs in this suit, and none of the plaintiffs were consulted about the change or consented to it.

Some or all of the plaintiffs had, however, heard rumors of the change. It was discussed among the non-union work force. Atlas' President became aware of employee concern about the change, and assured the non-union employees that this had made the plan stronger, and was to their benefit. At the time the President of Atlas gave these assurances, he knew that the trusteed plan was not, in fact, more reliable, that it was made necessary by economic losses, and that it made the fate of retired employees

subject to the vicissitudes of Atlas' future operations. He not only willfully withheld these facts; he deliberately misrepresented the trust.

By September 9, 1964, the date the original pension plan was instituted, three plaintiffs (Thoits, Fisher and Mahoney) had completed all of the service required to obtain maximum benefits under the plan and were given full credit for such pre-plan service. All but two (Gurney and Karl) had acquired sufficient work credits to entitle them to minimum retirement benefits. As a result of this, and the credit due to other employees, the plan began with a large unfunded accrued liability. This deficit became larger when, in 1966, benefits were increased, effective June 30, 1967, and when changes were made effective April 15, 1968 to enlarge the group eligible for retirement. Atlas' President knew all of this, and knew the hazard created by this liability, coupled with the change in Atlas' profits. He not only did not disclose the facts; he misled the non-union employees with respect to them.

All of the documents pertinent to the pension plan, including the Aetna contract and the pension trust, were kept in the office at Atlas. The plaintiffs could have asked to see any or all of the relevant documents. But they did not, relying instead on the assurances of Atlas' President. One plaintiff, Mrs. Orvilla Silva, was involved in pension plan administration, but at no time was the nature of the new plan explained to her, and she never read it to determine how it affected her personal future.

Pension plans presently in force must comply with elaborate federal requirements adopted in part to avoid the predicament of the present plaintiffs. See, Employment Retirement Income Security Act of 1974, Pub. L. 93-406, 88 Stat. 829, 29 U.S.C. § § 1001, *et. seq.* While pension plans adopted (and terminated) prior to June 30, 1974 are not

subject to this statute, see 29 U.S.C. § 1381(a) (2), they must meet certain requirements of federal law, for example, the Welfare and Pension Plan Disclosure Act, 29 U.S.C. § § 301-309. But they are nonetheless contractual relationships governed by state law. *Craig* v. *Bemis Co., Inc.*, 5 Cir. 1975, 517 F.2d 677, 680; *Miller* v. *Davis*, 6 Cir. 1974, 507 F.2d 308, 311; *Hurd* v. *Hutnik*, D.N.J. 1976, 419 F. Supp. 630, 653.

The first issue in the case is whether Atlas' voluntary establishment of a pension plan for its non-union employees and the acts of individual employees in qualifying for the plan constitutes a contract between the company and those employees whose rights have become vested. Because this has not been expressly decided under Masachusetts law, counsel were consulted about whether the question should be certified to the Massachusetts Supreme Judicial Council, as its rules apparently permit. Rule 3:21, Mass. Supreme Judicial Court Rules. However, counsel for both parties have requested the court itself to attempt to decide the issue.

Absent Massachusetts authority, we must consider the trend in other jurisdictions for guidance as to how a Massachusetts court would resolve the problem. According to "Annotation: Pension Plan—Rights of Employee", 42 A.L.R.2d 462, 463:

> The announcement of a pension plan under which most of the employer's workers may expect eventually to become entitled to retirement benefits clearly has some tendency to induce employees to remain in the employment and so reduce labor turnover, and the courts have agreed that the benefits so derived by the employer constitute a sufficient consideration to support a reciprocal undertaking by the employer to pay pensions, so that where the employer has not clearly and unequivocally disclaimed any intention to become

> legally bound, it has usually been held that an employee having satisfied the announced conditions necessary to render him eligible for benefits acquires a legally enforceable right, either on the ground that the employer's unilateral offer was accepted by completing performance or under the theory of promissory estoppel.

This editorial comment appears to reflect fairly the substance of the cases cited. Thus, in *Rochester Corporation* v. *Rochester,* 4th Cir. 1971, 450 F.2d 118, the court held that, once employees qualify under the pension plan, the employer's unilateral offer is deemed accepted and the offer becomes "irrevocable", saying:

> The pension plan provided that all employees of the defendant, if they remained in the employ of the defendant ten or more years, would be entitled, on attaining retirement age, to certain specified pension rights. While unilateral, that offer, when accepted by an employee as evidenced by rendering services for ten or more years, became "irrevocable" and such employee acquired "a right no less contractual than if the plan were expressly bargained for". By rendering service for the period required under the plan, the employee's rights to benefits under the plan are "earned no less than the salary paid to him (the employee) each pay period" and are "in the nature of delayed compensation for former years of faithful service". Whether the plan be contributory or noncontributory, the benefits, thus earned, are not gratuities.

450 F.2d at 120-121. See also *Hurd* v. *Hutnik,* N.J., 1976, 419 F.Supp. 630.

Cases concerning employees who never qualified under their particular plan, and hence whose rights to benefits had not vested are inapposite. This was the situation presented

in *Sbrogna* v. *Worcester Stamped Metal Co.,* Mass., 1968, 354 Mass. 17, 234 N.E. 2d 749; *Dwyer* v. *Climatrol Industries, Inc.,* 7th Cir. 1976, 544 F.2d 307; *Knoll* v. *Phoenis Steel Corporation,* 3rd Cir. 1972, 465 F.2d 1128; *Finnel* v. *Cramet, Inc.,* 6th Cir. 1961, 289 F.2d 671; and *Cf. Boase* v. *Lee Rubber and Tire Co.,* 3rd Cir. 1970, 437 F.1d 671 (sic).[2]

Nor are cases involving employees who were divested of their accrued benefits because they committed acts which the plan specifically identified as breaches of the agreement relevant here. See e.g., *Askinas* v. *Westinghouse Electric Corp.,* Mass., 1953, 330 Mass. 103, 111 N.E.2d 740; *Rochester Corp.* v. *Rochester,* 4th Cir. 1971, 450 F.2d 118 (covenant not to compete); *Neuffer* v. *Bakery and Confectionary Workers Int. U.,* D.C. Cir. 1962, 307 F.2d 671 (dual unionism). See and compare *Flaherty* v. *Gray,* Mass., 1956, 334 Mass. 117, 134 N.E.2d 144, where the court held that the plaintiff, whose rights to benefits had vested, could not recover from a joint pension fund contributed to by four employers where plaintiff's employer had failed to contribute to the fund. The court held that to allow such recovery would make all of the other employees' annuity plans unsound. The court did not decide the plaintiff's rights against his own employer.

The court believes that, if presented with the problem, a Massachusetts court would follow the prevailing trend and enforce the employer's contractual obligations.[3]

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[2] For a non-Massachusetts state case, see *Hughes* v. *Encyclopedia Britannica,* Ill., 1954, 1 Ill. App.2d 514, 117 N.E.2d 880, where the court stated, "Here there is an attempt to require the defendant to purchase annuities under a noncontributory pension plan which will *only at a later and contingent* date give rise to pension payments to the employees." (emphasis added).

[3] At the time of the trial, and at its conclusion, I thought that there was no contract, and, if there was a contract, no breach because of the termination clause. Further study of the jurisprudence, including cases and materials not referred to by counsel, have altered my opinion.

The defendants contend, however, that even if a binding contractual obligation existed, the terms of the contract itself reserved the right "to change, suspend or discontinue the plan at any time." While at one time voluntary pension plans were considered to be gratuities conferred by the employer, the current trend is to view them as constituting offers of additional compensation and as incentive to continuing and more dedicated service. *Cantor* v. *Berkshire Life Ins. Co.*, Ohio, 1960, 171 Ohio St. 405, 171 N.E.2d 518; *Tilbert* v. *Eagle Lock Co.*, Conn., 1933, 116 Conn. 357, 165 A 205; *Delaware Trust Co.* v. *Delaware Trust Co.*, Del., 1966, 43 Del. Ch. 186, 222 A.2d 320; *Schofield* v. *Zion's Co-op. Mercantile Inst.*, Utah, 1934, 85 Utah 281, 39 P.2d 342, 96 A.L.R. 1083, 46 A.L.R.3d 464. See, *Finnell* v. *Cramet, Inc.*, 6th Cir. 1961, 289 F.2d 409, where the court, applying Illinois law, suggested that if employees had already qualified for pensions at the time of modification or termination, their rights may not be denied under a provision reserving the employer's right to modify or terminate for any reason. However, because the employees' rights had not fully vested, termination was allowed. Hence, in *Dierks* v. *Thompson*, 1 Cir. 1969, 414 F.2d 453, 457, the court held:

> The plan was freely amendable under Article XIII. 8. (8. '[T]he Company shall have the right to amend this Agreement at any time and from time to time, to any extent that it may deem advisable.') That meant that *until a beneficiary's rights became vested by termination of his employment*, he could be deprived of future increases in benefits by the unilateral act of Textron. (Emphasis supplied.)

Similarly, in *Briggs* v. *Michigan Tool Co.*, E.D. Mich. 1974, 369 F. Supp. 920, 922, the court held that a provision entitling the employer to terminate the plan and relieve

himself of further liability did not relieve the employer of his obligation to pay those benefits that had accrued previously and did not relieve him from liability for his failure to fully fund the plan while it was in operation.

Employment Retirement Income Security Act of 1974, although not applicable here, goes a step further; it contains provisions requiring pre-retirement incremental vesting and funding. These provisions were legislated specifically because Cnogress wished to eliminate the harsh consequences that resulted from courts' "reluctan[ce] to apply concepts of equitable relief or to disregard technical document wording." See e.g., Senate Report 93-127, p. 5.

The rights of the plaintiffs to their benefits had accrued prior to the termination. Just as it is likely that a Massachusetts court would recognize that retired employees have a contractual right to their pensions, it is likely that a Massachusetts court would make the distinction suggested by the First Circuit Court of Appeals in *Dierks*, and restrict the employer's right to terminate so that it applied only to those beneficiaries whose rights had not vested.

There is an additional reason to hold the employer to its promise and its representation of that promise here. One who promises more than he, in fact, intends to deliver and thus misleads another to that person's detriment may be required to fulfill his promise. This is the doctrine of promissory estoppel. The rule is set forth in the Restatement of Contracts, § 90 as follows:

> A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

Massachusetts courts recognized and applied this rule of promissory estoppel before it was thus restated, and have

continued to do so. Thus in *McLearn* v. *Hill,* 1931, 276 Mass. 519, 177 N.E. 619, the court said:

> It is in the main to accomplish the prevention of results contrary to good conscience and fair dealing that the doctrine of estoppel has been formulated and taken its place as a part of the law. It has been said that, 'In order to work an estoppel it must appear that one has been induced by the conduct of another to do something different from what otherwise would have been done and which has resulted to his harm and that the other knew or had reasonable cause to know that such harm might follow.'

At least one United States District Court, applying both federal statute and New Jersey law, has held employers estopped from terminating benefits promised under a pension plan after the employees who had relied on the promise had retired. In *Hurd* v. *Hutnik,* D.N.J. 1976, 419 F.Supp. 630, 655, the court stated:

> The employers contend that even if a lifetime pension was promised, it was conditioned on the availability of adequate monies in the fund from which it could be paid . . . . To give effect to such a limitation now, however, after fourteen years of consistent representations to the employees that the pension for which their union had given up current benefits would be for life, and after hundreds of workers had elected to retire and to refrain from further work in the industry in reliance on this promise, is unconscionable.

In the present case, plaintiffs reasonably relied on the existence of a pension plan and their receipt of pension benefits; as a consequence, they refrained from seeking substitute funds. They continued to place their faith in the employer. Those eligible to elect a union as bargaining agent did not do so. The employer misrepresented the vulnerable position they would be in, upon retirement, by intentionally concealing the precarious nature of the second plan. In the absence of such deceit, plaintiffs would have had the opportunity to arrange for their security in the later years of their life. To allow the employer to deny the pension benefits, upon which the plaintiffs relied substantially in forming their retirement plans, would be unconscionable. Considering the Massachusetts courts' willingness to invoke principles of estoppel to prevent such manifest injustice, this court concludes that a Massachusetts court would estop the defendant from denying his obligations. The court, therefore, holds that plaintiffs are entitled to those benefits for which they qualified under the original plan.

RUBIN, C. J.
Fifth Circuit Judge

New Orleans, Louisiana
November 1, 1977

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 77-1517

RAYMOND HOEFEL,
PLAINTIFF, APPELLEE,
v.
ATLAS TACK CORPORATION,
DEFENDANT, APPELLANT.

No. 77-1519

RAYMOND MAHONEY, et al.,
PLAINTIFFS, APPELLEES,
v.
GREAT NORTHERN INDUSTRIES, INC., et al.,
DEFENDANTS, APPELLEES.

ATLAS TACK CORPORATION,
DEFENDANT, APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. ALVIN B. RUBIN,* *U.S. Circuit Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL AND BOWNES, *Circuit Judges.*

Edward R. Lev, with whom *Joseph Auerbach*, *Edward Woll, Jr.*, and *Paulette Kessler* were on brief, for appellant.
Alan S. Novick, with whom *Novick & Siegel*, was on brief, for appellees.

August 9, 1978

* Of the Fifth Circuit, sitting by designation.

HOEFEL *v.* ATLAS TACK CORPORATION

COFFIN, *Chief Judge.* Plaintiff-appellees are ten retired employees of defendant-appellant, Atlas Tack Corporation (Atlas). In two separate actions,[1] originally commenced in the Massachusetts Superior Court, they sought to recover certain pension benefits allegedly due them under a pension plan in effect during the period of their employment with Atlas. That plan, having been the product of an agreement between Atlas and one of its collective bargaining units, the International Union, United Automobile, Aeropower and Agricultural Implement Workers of America, UAW and its Local 899 (UAW), provided the basis for federal jurisdiction under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185.[2] On Atlas' motion, the actions were removed to the United States District Court for the District of Massachusetts. There they were consolidated for trial. At the close of plaintiffs'

[1] In the first action, *Mahoney* v. *Atlas Tack Corp.*, Docket No. 73-1038-F (D. Mass. 1973), nine nonunion employees joined as plaintiffs. Four were foremen; the rest were office clerical workers. The second action, *Hoefel* v. *Atlas Tack Corp.*, Docket No. 75-4526-F (D. Mass. 1975), was brought solely by Raymond Hoefel, also a retiree. Hoefel was a member of the Atlas Tack Metal Workers' Union, A.F.L. Federal Labor Union No. 23947 (Tackmakers' Union).

[2] The *Mahoney* plaintiffs claim pension rights under the same pension plan that is part of a collective bargaining agreement. Judicial interpretation of their rights therefore could be expected to influence Atlas' administration of the plan even as to the bargaining unit employees. Also, defenses raised by Atlas in suits brought by the *Mahoney* plaintiffs could be foreclosed by collateral estoppel in later suits by bargaining unit members. As a result, the *Mahoney* plaintiffs' interest "are to a large degree inevitably intertwined with union interests." *Smith* v. *Evening News Ass'n*, 371 U.S. 195, 200 (1962). "To exclude these claims from the ambit of § 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law." *Id.* For this reason, § 301 jurisdiction properly extends to the *Mahoney* plaintiffs' claims. This accords with the long-established view that § 301 has substantive content and is "not to be given a narrow reading." *Id.* at 199; *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 457 (1957).

case, the court dismissed their breach of contract claim, but reserved judgment as to whether they could recover under the doctrine of promissory estoppel. At the end of the three day trial, the court held for plaintiffs upon the latter ground and entered a judgment of $102,791, a sum reflecting the amount necessary to purchase life annuity contracts for each of the plaintiffs yielding a monthly payment equal to the pension each plaintiff had earned.

Subsequently, the court filed a written opinion in which it reaffirmed its decision as to promissory estoppel and also held that, upon reconsideration of the applicable law, plaintiffs had a contractual right to their pensions. Atlas appeals, contesting both its liability and the measure of damages. We agree with the district court that plaintiffs have a contractual right to their pensions and affirm on that ground.[3]

In September, 1964, Atlas instituted a pension plan pursuant to a collective bargaining agreement between it and the UAW. Atlas voluntarily extended the plan to cover non-union employees, including the nine plaintiffs in the *Mahoney* action.[4] The plan was also made a part of Atlas' contract with the Tackmakers' Union, thus bringing plaintiff Hoefel under its provisions.

The plan provided that employees who earned a specified number of service credits and reached a specified age would receive upon retirement a monthly pension in an amount determined by the number of credits earned. As originally established, the plan was administered by the Aetna Life Insurance Co. Under its terms, when an employee reached retirement age, Atlas contributed a sum of money sufficient to buy a lifetime annuity contract yielding the monthly pension to which the employee was entitled.

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[3] Because of our resolution we have no occasion to rule on the court's alternative ground of estoppel.

[4] *See* note 1, *supra*.

At the time the plan was adopted, each of the plaintiffs was an Atlas employee. Each received a summary of the benefits under the plan. Paragraph 14 of the summary provided:

> "The Company fully expects to continue the Plan subject to the terms of its present Pension Agreement with its employees. However, since future changes in conditions cannot be foreseen, the Company necessarily reserves the right to change, suspend or discontinue the Plan at any time. No change, suspension, or discontinuance will adversely affect the pensions already purchased, unless a change is made in the Plan for the purpose of meeting the requirements of the Federal Internal Revenue Code or any other applicable law."

At its inception, the plan provided that employees receive credit for pre-plan service. Because of these credits, the plan began with a large unfunded liability. This deficit increased when benefits were increased in 1966, and increased again as of April 15, 1968, when the group eligible for retirement with pension was enlarged. Another change made in April of 1968 was the conversion of the plan from the Aetna insurance funded plan to a trust funded plan (trusteed plan). Under the new arrangement, Atlas annually contributed an amount sufficient to pay the benefits then due each employee during the year. This change did not purport to affect any employee's entitlement to his pension. It did, however, affect the manner in which Atlas provided for pension payments. Under the insurance plan, when an employee retired, a lifetime annuity contract was purchased for him. Thus, subsequent amendment or discontinuance of the plan could not adversely affect a retiree. Under the trusteed plan, however, benefits came to depend, as the district court described, upon the continuance of the plan and on Atlas' continued solvency.

The change from an insured plan to a trusteed plan was motivated by Atlas' financial difficulties. The costs of the insured plan were substantially higher than the trusteed plan, and Atlas, then suffering economic losses, felt it necessary to reduce the annual amount it was required to pay in benefits. These facts were disclosed to the UAW which then agreed to the change in the plan as to its members. Non-union member employees, such as the plaintiffs,[5] were not informed as to the reasons for the change, nor did they consent to it. In fact, soon thereafter, Atlas through its president misled the non-union employees as to the effect of the change. The evidence supported the district court's finding that

> "Atlas' President became aware of employee concern about the change, and assured the non-union employees that this had made the plan stronger, and was to their benefit. At the time the President of Atlas gave these assurances, he knew that the trusteed plan was not, in fact more reliable, that it was made necessary by economic losses, and that it made the fate of retired employees subject to the vicissitudes of Atlas' future operations. He not only willfully withheld these facts; he deliberately misrepresented the trust."

In February of 1973, Atlas terminated the pension plan. Prior to that time, but after April, 1968, each of the plaintiffs had retired from Atlas' employment. Each had qualified, upon retirement, for a pension and began to receive monthly payments. In fact ,each plaintiff, save one, had qualified for a pension prior to the April, 1968, amend-

[5] While it is true that plaintiff Hoefel, as a member of the Tackmakers' Union, agreed to a collective bargaining agreement which incorporated the plan as it stood in 1969, there is nothing in the record which suggests that Atlas revealed these facts to Hoefel. Thus, it appears that his position was no different from that of the non-union plaintiffs.

ments. Because each had retired after the change from the insurance plan to the trusteed plan, however, no annuity contract was ever purchased for any of the plaintiffs. Upon terminating the plan, Atlas ceased to make payments to the plaintiffs.

The district court credited testimony to the effect that plaintiffs reasonably believed that under the plan, upon qualifying, they would receive a pension for life. It also appears to have credited the testimony from several of the plaintiffs that they continued to work for Atlas after 1967-68 in reliance upon the promise of pension benefits. The court held that Atlas' offer of a pension to its employees became a binding unilateral contract as an employee qualified for a pension by rendering the required number of years of service. Further, it held that the termination clause in the plan did not permit Atlas to discontinue payments to the plaintiffs whose rights had already vested.

Through the enactment of the Employment Retirement Income Security Act of 1974, Pub. L. 93-406, 88 Stat. 829, 29 U.S.C. §§ 1001 *et seq.*, Congress manifested its concern to safeguard the pension rights of American workers from the risks similar to those involved here. That statute, while an expression of national policy, has no direct bearing on pension plans terminated prior to 1974 as was Atlas'. Rather, as the parties concede, the nature of the contractual rights of the parties, if any, is governed by state law. *Craig* v. *Bemis Co.*, 517 F.2d 677, 680 (5th Cir. 1975); *Hurd* v. *Hutnik*, 419 F. Supp. 630, 653 (D. N.J. 1976).

The threshold question is whether Atlas' voluntary establishment of a pension plan and the acts of employees to qualify for a pension under the plan constitute a contract between Atlas and those employees whose rights have become vested. While noting that the Massachusetts courts have never squarely faced the question, the district court, relying on the trend of modern authority, answered in the

affirmative. Since the district court's opinion, the Supreme Judicial Court decided the case of *Balkin* v. *Frank M. Katz, Inc.*, Mass. Adv. Sh. 2036, 367 N.E.2d 638 (1977), which tends to confirm that answer. There an employee sued to enforce an oral promise by his employer's president to pay him a pension. The Supreme Judicial Court reversed the dismissal below, which was based upon a finding of lack of consideration, holding that where a pension is promised to encourage faithful service, the offer becomes a binding obligation upon completion of such service if rendered in reliance upon the promised benefit. 367 N.E.2d at 630.

Balkin reflects the Massachusetts court's acceptance of the modern view that the promise of a pension constitutes an offer which, upon performance of the required service by the employee becomes a binding obligation. As stated in *Rochester Corp.* v. *Rochester*, 450 F.2d 118, 120-21 (4th Cir. 1971):

> "The pension plan provided that all employees of the defendant, if they remained in the employ of the defendant ten or more years would be entitled, on attaining retirement age, to certain specified pension rights. While unilateral, that offer, when accepted by an employee as evidenced by rendering services for ten or more years, became 'irrevocable' and such employee acquired 'a right no less contractual than if the plan were expressly bargained for.' By rendering service for the period required under the plan, the employee's rights to the benefits under the plan are 'earned no less than the salary paid to him (the employee) each pay period' and are 'in the nature of delayed compensation for former years of faithful service.' Whether the plan be contributory or non-contributory, the benefits, thus earned ,are not gratuities." (Citations omitted.)

Accord, Hurd v. *Hutnik, supra,* 419 F. Supp. at 653-54 (applying New Jersey law); *Hardy* v. *H. K. Porter, Inc.*, 417 F. Supp. 1175 (E.D. Pa. 1976) (applying Pennsylvania law), *aff'd in part, rev'd in part mem.*, 562 F.2d 42 (3d Cir. 1977); *Miller* v. *Dictaphone Corp.*, 334 F. Supp. 840, 841-42 (D. Ore. 1971) (applying Oregon law); *Ehrle* v. *Bank Bldg. & Equip. Corp. of America*, 530 S.W.2d 482 (Mo. Ct. App. 1975); *Stopford* v. *Boonton Molding Co.*, 56 N.J. 169, 265 A.2d 657 (1970); *Delaware Trust Co.* v. *Delaware Trust Co.*, 43 Del. Ch. 186, 222 A.3d 320 (1966); *Cantor* v. *Berkshire Life Ins. Co.*, 171 Ohio St. 405, 171 N.E.2d 518 (1960); *Schofield* v. *Zion's Co-operative Mercantile Inst.*, 85 Utah 281, 39 P.2d 342, 96 A.L.R. 1083 (1934); *Tilbert* v. *Eagle Lock Co.*, 116 Conn. 357, 165 A.2d 205 (1933). *But cf. Boase* v. *Lee Rubber & Tire Co.*, 437 F.2d 527 (3d Cir. 1970) (applying New York law). *See generally* Annot. 42 A.L.R. 2d 462, 46 A.L.R.3d 464.

Even if the establishment of a pension plan by an employer and an employee's subsequent qualification thereunder gives rise, as a general matter, to a vested, enforceable contractual right to the pension earned, Atlas claims that that right can be defeated here because it reserved "the right to change, suspend or discontinue the plan at any time." In urging that we construe this language to permit Atlas to cut off benefits to employees who had already retired, having qualified for a pension, it cites several cases in which courts have permitted alteration of pension plans over the opposition of employees who had not qualified for a pension.[6] Concededly there is language

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[6] *See Dwyer* v. *Climatrol Ind., Inc.*, 544 F.2d 307 (7th Cir. 1976), *aff'g*, 403 F. Supp. 684 (E.D. Wis. 1975), *cert. denied*, 430 U.S. 932 (1977); *Craig* v. *Bemis Co., supra*; *Knoll* v. *Phoenix Steel Corp.*, 465 F.2d 1128 (3d Cir. 1972); *Finnell* v. *Cramet, Inc.*, 289 F.2d 409 (6th Cir. 1961); *Sbrogna* v. *Worcester Stamped Metal Co.*, 354 Mass. 17, 234 N.E.2d 749 (1968); *Bono* v. *Kramer*, 346 Mass. 355, 191 N.E.2d 760 (1963).

in some of these cases supporting Atlas' position. However, we agree with the district court that they are not apposite since there the employees had not yet qualified for a pension and thus had not yet acquired any vested contractual rights as have the plaintiffs here.

A number of courts have construed pension plans which reserve to the employer the right to alter or discontinue, similar to the one involved here, as limiting the employer's reserved right to apply only to employees whose pension rights had not, at the time of the change, already vested. Instructive is the opinion of the Ohio Supreme Court in *Cantor* v. *Berkshire Life Ins. Co., supra.* There an employee sued to recover certain additional retirement benefits. The contested amounts were due under a contract in which the employer had reserved the right to terminate. Noting the importance which retirement benefits have come to assume both to the employee as a form of deferred compensation to provide for old age, and to the employer as a means of obtaining a more stable and productive work force, the court first concluded that pension plans give "rise to contractual rights enforceable by the employee who has complied with all the conditions of the plan." And because, under this contractual theory, an employee acquired a vested right by providing the required consideration, it follows that

> "... even though the employer has reserved the right to amend or terminate the plan, once an employee, who accepted employment under such a plan, has complied with all the conditions entitling him to participate in such plan, his rights become vested and the employer cannot divest the employee of his rights thereunder." 171 N.E. 2d at 522.

See Matter of Erie Lackawanna Ry. Co., 548 F.2d 621, 625-27 (6th Cir. 1977); *Sheehy* v. *Seilon, Inc.*, 10 Ohio St. 2d 242, 227 N.E. 2d 229 (1967); *Ehrle* v. *Bank Bldg. & Equip. Corp. of America, supra; Stopford* v. *Boonton Molding Co., supra; Schofield* v. *Zion's Co-operative Mercantile Inst., supra.*

In the face of these authorities, Atlas relies principally upon *Boase* v. *Lee Rubber & Tire Corp.*, 437 F.2d 527 (3d Cir. 1970). There the Third Circuit was called upon to construe the provisions of a pension plan arising under New York law. The court first noted that it was unclear whether or not the New York courts had yet rejected the discredited "gratituity" theory of pensions. It then went on to hold that where an employer, in "clear and unambiguous" language reserves the right to terminate a pension plan, it can do so even in a manner which deprives retired employees of earned pension benefits. In reaching its conclusion, the court purporteed to find no countervailing public policy which militated for a different result.

While we believe that the employer in *Boase* brought home to its employees the tenuous nature of the pension rights it promised in a far clearer and more forthright manner than did Atlas, we would decline to follow *Boase* in any event. We believe that public policy long has required that pension plans be construed, where possible, to avoid the forfeiture of rights which an employee, through years of service, has earned, *see, e.g., Neuffer* v. *Bakery Conf. Workers Int. Union*, 307 F.2d 671, 674-75 (D.C. Cir. 1962) (Burger, J., dissenting); *Ehrle* v. *Bank Bldg. & Equip. Corp. of America, supra; Stopford* v. *Boonton Molding Co., supra; Cantor* v. *Brookshire Life Ins. Co., supra; Schofield* v. *Zion's Co-operative Mercantile Inst., supra; see also Fortune* v. *National Cash Register Co.*, Mass. Adv. Sh. 1569, 364 N.E. 2d 1251 (1977) (implied covenant of good faith and fair dealing in employment contract violated by employer's termination of at will contract to avoid paying employee's commission); and the concerns motivating Congress to enact ERISA in 1974 confirm our view.

See H. Rep. No. 93-807, 93d Cong., 2d Sess., 3 U.S. Code Cong. & Ad. News 4670, 4676 (1974); S. Rep. No. 93-127, 93d Cong., 2d Sess., 3 U.S. Code Cong. & Ad. News 4841-42 (1974).

The district court found that the plaintiffs reasonably believed that under Atlas' pension plan they would be entitled to a pension for life upon retirement provided that they serve Atlas a specified number of years.[7] While Atlas reserved the right to discontinue the plan, it never explicitly told its employees that discontinuance could cut off payment of pensions already earned. In fact, Atlas told its employees that "no change, suspension or discontinuance will adversely affect the pensions already purchased." That was, of course, true through April, 1968, since up to that time Atlas met its obligation to provide a life pension to its qualified employees by purchasing upon their retirement an annuity contract. Once such a contract was purchased, nothing Atlas might do or fail to do could affect payments. In April of 1968, all but one of the plaintiffs could have retired with a pension prior to Atlas' change to the trusteed plan.[8] The effect of that change

[7] Atlas argues that the court's grant of its motion to dismiss the contractual claim at the end of plaintiffs' case rendered the court's subsequent grant of relief on that claim reversible error. While generally it is not good practice to grant a defendant's rule 41(b) motion and later to reverse that ruling because the defendant may be deprived of the opportunity or incentive to meet plaintiff's case, here, however, Atlas was not prejudiced. In defending against plaintiffs' promissory estoppel claim, it thoroughly explored the plaintiffs' knowledge of the plan. Moreover, the history of Atlas' negotiations with the UAW would not, we believe, affect the construction of the offer of a pension to these non-union or non-UAW plaintiffs who took no part in the negotiation of the terms of the plan.

[8] Plaintiff Karl's eligibility for a pension upon her retirement in 1970 was dependent upon the amendment to the plan made in April, 1968, which, along with changing to the trusteed plan form, also decreased the required number of service credits. That fact does not, we believe, render the contract analysis inapplicable in her case. Karl, like each of the other plaintiffs, had qualified for a

was never explained to the plaintiffs. In fact, as the district court found, the evidence supports the conclusion that the company misled its non-union employees concerning the change. Where the employer establishes the terms of a pension plan, those terms should be construed in favor of the employee. *See, e.g., Ehrle* v. *Bank Bldg. & Equip. Corp. of America, supra,* 530 S.W. 2d at 492; *Stopford* v. *Boonton Molding Co., supra,* 265 A.2d at 665. That rule of construction seems especially appropriate where the employer has also been guilty of misrepresentation.

Atlas finally claims that its amendment of the plan from the insured plan to the trusteed plan, and its later complete termination of the plan were justified by economic necessity. We fail to see how Atlas' financial difficulties can excuse its performance of its contractual pension obligations to its former employees. *Cf. Matter of Erie Lackawanna Ry. Co., supra,* 548 F.2d at 627.

We conclude that the district court was correct in holding that the plaintiffs had a contractual right to their pensions and that Atlas breached its duty to pay those pensions when it terminated payments in 1973.

Atlas also challenges the district court's measure of damages. Those damages were computed by adding (1) the value of the pension payments due between the termination of the plan and the date of the judgment to (2) the amount needed to purchase for each plaintiff an individual annuity yielding monthly payments in the amount of the pension to which each plaintiff was entitled, minus (3) a set off for the lump sum payment made by Atlas upon termination of the plan. Atlas apparently objects to the court's use of the cost of an individual annuity in item 2. It would

pension upon retirement. She had in effect acquired a vested right to benefits and began to receive them. When Atlas sought to terminate the plan in 1973, and in so doing stop payments to its retired employees, it breached its obligation to Karl just as it did to the other plaintiffs with vested pension rights.

have had the court use an amount, which, if contributed to a large trust fund earning eight per cent, would yield the required monthly sum.

Plaintiffs had a right to their pensions. That right existed whether Atlas met its obligation through a trust fund or individual annuity contracts. Having terminated the trust fund, however, Atlas has left plaintiffs with only the option of investing as individuals. The record supported the district court's skepticism as to the likelihood that small and unsophisticated investors like the plaintiffs could obtain an eight per cent return. We agree that the cost of an individual annuity, competitively priced, is a fair and reasonable measure of damages. *Stopford* v. *Boonton Molding Co., supra,* 265 A.2d at 668; *see Minnesota Amusement Co.* v. *Larkin,* 299 F.2d 142, 153 (8th Cir. 1962).

Affirmed.

Adm. Office, U. S. Courts — Blanchard Press, Inc., Boston, Mass.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 77-1517.

RAYMOND HOEFEL,
Plaintiff, Appellee,

v.

ATLAS TACK CORPORATION,
Defendant, Appellant.

No. 77-1519.

RAYMOND MAHONEY, ET AL.,
Plaintiffs, Appellees,

v.

GREAT NORTHERN INDUSTRIES, INC., ET AL.,
Defendants, Appellees.

ATLAS TACK CORPORATION,
Defendant, Appellant.

ORDER OF COURT

Entered September 12, 1978

It is ordered that the petition for rehearing herein filed on August 23, 1978 be, and the same hereby is, denied.

By the Court:

/s/ DANA H. GALLUP
Clerk.

[cc. Messrs. Lev and Novick.]

APPENDIX D

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

Civil Action File No. 73-1038-F—75-4326-F

JUDGMENT

RAYMOND MAHONEY, ET AL.,

vs.

ATLAS TACK CORPORATION.

This action came on for trial (hearing) before the Court, Honorable ALVIN B. RUBIN*, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered. For oral reasons assigned and for written reasons to be assigned hereafter, judgment is rendered in favor of each of the following plaintiffs, individually, and against Atlas Tack Corporation for the amount shown beside the name of each plaintiff:

Edward Ehrhardt	$ 3,907.92
Blanche King	$ 6,787.89
James Mello	$14,033.60
Orvilla Silva	$12,114.05
Elsie Thoits	$12,344.28
Milton Fisher	$16,429.05
Marion Gurney	$ 6,668.42
Mildred Karl	$ 5,695.16
Raymond Mahoney	$ 7,767.42
Raymond Hoefel	$10,474.80

Interest is awarded at the rate of 8% per annum from September 1, 1977.

Dated at Boston, Massachusetts, this 1st day of September, 1977.

CLYDE B. KELTON JR.
Deputy Clerk of Court

* Sitting by designation

APPENDIX E

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 73-1165—MA

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AND ITS LOCAL 899, UAW,

Plaintiff

v.

ATLAS TACK CORPORATION AND M. LEONARD LEWIS, RICHARD A. SECOR AND WILLIAM F. MACNAMARA,

Defendants

MEMORANDUM AND ORDER

MAZZONE, D.J. June 2, 1978

The plaintiff, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, and its Local 899 UAW ("Union"), commenced this action on April 13, 1973 against the defendants, Atlas Tack Corporation ("Atlas") and trustees M. Leonard Lewis, Richard A. Secor and William F. MacNamara. Count I alleges that, under a collective bargaining agreement ("Agreement") "effective from July 1, 1969 to July 31, 1972 and . . . extended beyond that date", Atlas was obligated to continue in effect a pension plan. The unilateral termination of the pension plan is alleged to be a violation of Atlas' obligation thereby depriving Union members who are company employees of retirement benefits. Count II alleges a breach of fiduciary duty by the trustees under a trust set

up by Atlas to fund the pension plan. Count II is brought "on behalf of the Union and on behalf of the members who are entitled to pension benefits at Atlas whose names are too numerous to be mentioned here individually, but who are joined in the action and on behalf of all others similarly situated." Count III alleges a conspiracy between Atlas and the trustees of the pension plan to deprive the beneficiaries of the pension agreement of the benefits to which they are entitled. The essence of the plaintiff's requested relief is that the Court reinstate the pension plan and order that the trustees account to the trust for the trust's alleged insufficient funding. Count I jurisdiction is based on Section 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185. Jurisdiction for Counts II and III is based on a theory of pendent jurisdiction.

The defendants move to dismiss this action pursuant to 12(b)(1) F.R. Civ. P. for lack of subject matter jurisdiction. They argue that there is no subject matter jurisdiction because there is no underlying collective bargaining agreement upon which to base federal jurisdiction under LMRA § 301(a), 29 U.S.C. § 185(a). That section provides:

> "Suits for violation of contracts betwen an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Basically, this is a suit for breach of contract and the defense is that there is no contract.

After hearing, and consideration of the entire record, the facts most favorable to the plaintiff are as follows: The Union is a voluntary unincorporated association with offices

in New Bedford, Massachusetts. It is engaged in collective bargaining for wages, hours, and other term and conditions of employment within the meaning of the Labor Management Relations Act of 1947. Atlas is a Massachusetts corporation engaged in the manufacture of eyelets, tacks and other metal products with offices in Fairhaven, Massachusetts. The company employs members of the Union in its manufacturing operations. Trustees of the pension plan at issue here are: M. Leonard Lewis, President of Atlas and President of Great Northern Industries, Inc., a holding company which wholly-owns Atlas, Richard Secor, Vice President and Secretary of Atlas and Great Northern Industries, and William F. MacNamara, a shareholder.

The facts are as follows: On July 1, 1969 the Union and Atlas entered into an agreement which contained the following clause:

> "This agreement shall become effective as of the first day of July, 1969 and shall continue in force and effect until 11:59 on the 31st day of May 1972. This agreement shall continue from year to year thereafter unless either party notifies the other in writing not less than sixty (60) days prior to the first day of June of any year thereafter that such party elects to terminate, modify or amend this agreement."

On March 13, 1972, the Union, by Alfred Olerio, Subregional Director, sent a letter to Atlas advising the corporation of the Union's intent to "amend and modify said Agreement and Pension Plan" and stating their "desire to negotiate with (the) corporation as soon as possible." The letter also stated:

> "This notice to amend and modify the current agreement and all memoranda thereto shall have the effect of terminating the entire agreement on the expiration date in the same manner as a notice of desire to terminate unless before that date all subjects of amendment proposed by either party have been disposed of by agreement or withdrawn by the party preparing amendment."

On June 2, 1972 the Union and Atlas agreed in writing to extend the Agreement of July 1, 1969 to June 30, 1972. Further, they provided that "in the event the parties reach an agreement on or before June 30, 1972, any general wage increases or wage adjustment shall become retroactive to May 31, 1972." No further written collective bargaining agreement was adopted and the parties did not execute a further written extension of the July 1969 agreement.

After June 30, 1972, the parties attempted to negotiate new contract terms without success. The parties did reach a tentative agreement on a new contract during the month of June, 1972, but when that tentative agreement was referred to the union membership for ratification, it was voted down. The negotiating teams met again in August, 1972, but were not successful and an impasse was apparently reached. However, while the negotiations were going on, the parties continued to operate in a manner consistent with the terms and conditions of the earlier agreement until September 26, 1972. On that date the company announced that it was putting into effect a new rate schedule. On September 27, 1972, the day after the new rate schedule was implemented, the Union notified the company that it did not approve of the company's action in making the proposed rates effective prior to ratification. However, no new proposals were made by either party subsequent to August 1972. In November 1972, Atlas announced that it was unilaterally terminating the agreement.

The central issue is whether, given the fact that the written agreement was terminated on June 30, 1972, there continued to exist an oral agreement or some form of

implied agreement. Where there is no collective bargining agreement between the defendant and the union establishing the underlying obligation, this Court does not have jurisdiction under 29 U.S.C. § 185. *Caporale* v. *Di-Com Corporation,* 345 F.Supp. 153 (1972). The plaintiff asserts that because negotiations took place and the parties abided by the terms and conditions of the contract that the parties intended that the agreement continue on indefinitely. The plaintiff does not assert an express oral agreement to continue; rather they ask this Court to infer that from the actions of the parties. The evidence does not warrant such an inference. It appears that there was an initial attempt to reach a new agreement which failed. Actions such as that of the Union in voting down the new agreement and of the company in implementing a new rate schedule and terminating the pension plan do not indicate that any agreement existed between the parties. This is not a case of an "oral agreement for purposes of bridging a period of negotiation or renegotiation, whether there be a provision of a prior written agreement or a formal oral agreement between the parties." *Food Handlers Local No. 425* v. *Arkansas Poultry Coop., Inc.,* 199 F.Supp. 895, 901 (W.D. Ark. 1961). See also *Procter & Gamble, Inc.* v. *Procter and Gamble Mfg. Co.,* 312 F.2d 181, 184 (2nd Cir., 1962).

While it is true that the law provides that negotiation allows for a period of suspending or postponing the normal effect of the notice of termination sent by the Union on March 13, 1972, "the end of negotiation, whether success or failure marks the end of this postponement." *Patterson Parchment Paper Co.* v. *International Brotherhood of Paper Makers, et al.,* 191 F.2nd 252, 254 (3rd Cir., 1951).

Finally, assuming the plaintiff could prove an oral agreement to continue, the pension plan standing alone cannot operate to confer jurisdiction on this Court. As the court

stated in *O'Rourke* v. *Breakstone Bros., Inc.,* 218 F.Supp. 648 (1963):

> "Here, we have no such link with a labor dispute or labor contract; if the existing collective bargaining agreement be the underlying 'labor contract' essential for invoking the jurisdiction of Section 301, as we think it must be, then its absence or termination cuts off an arguable coverage under Section 301; standing alone, a welfare and pension plan could hardly qualify as a 'labor contract' for purposes of Section 301." At 651.

Accordingly, the Court finds there is lack of subject matter jurisdiction as to Count I.

The defendants have argued that Counts II and III also should be dismissed because they are appended merely to give the plaintiff capacity to sue and the doctrine of pendent jurisdiction over state claims does not permit a federal court to give a party the capacity to bring a state claim in federal court where that party would not have the capacity to bring that claim in state court, citing *Woods* v. *Interstate Realty Co.,* 337 U.S. 535, 538-9 (1949). Whether pendent jurisdiction claims are also dismissed when the underlying federal claim is dismissed is clearly a matter of the Court's discretion. Since Counts II and II are predicated solely on state law, the Court finds no basis to exercise its discretion to retain jurisdiction over those claims.

ORDER

The Motion to Dismiss the Complaint is ALLOWED.

A. David Mazzone

APPENDIX F

UNITED STATES CONSTITUTION
AMENDMENT FIVE

"No person shall be . . . deprived of life, liberty or property, without due process of law. . . ."

FEDERAL RULES OF CIVIL PROCEDURE,
RULE 41(b)

"(b) *Involuntary Dismissal: Effect Thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

LABOR-MANAGEMENT RELATIONS ACT,
§ 301(a) (29 U.S.C. § 185(a))

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."